Supreme Court, U.S.
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No. _____

In the

SUPREME COURT OF THE UNITED STATES

October Term, 1994

Robert Camp

Petitioner

v.

Phillip G. Ruffin, d/b/a/ Harper Trucks, Inc., d/b/a Harper Hand Trucks, Inc. and Harper Trucks, Inc.

Respondents

On Petitioner for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the Petitioner has stated facts which meet the notice pleading requirements of Fed.R.Civ.P.8 for stating a cause of action for breach of contract.

Whether an employment contract which is terminable at will prevents a terminated employee from making a claim for breach of contract for commissions and bonuses earned prior to the termination of employment.

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IN THE SUPREME COURT OF THE UNITED STATES
October Term, 1994

ROBERT CAMP, Petitioner,

v.

PHILLIP G. RUFFIN, Individually and/or d/b/a HARPER HAND TRUCKS, INC. and/or d/b/a HARPER TRUCKS, INC., and HARPER TRUCKS INC., Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Robert Camp respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App., infra, 15a-21a) is reported at 30 F.3d 37. The opinion (Order Granting Summary Judgment) of the district court (App., infra, 1a-12a) is unreported. Judgment was entered on November 10, 1993. (App., infra, 13a-14a)

JURISDICTION

The court of appeals affirmed the trial court's judgment on August 25, 1994. (App., infra, 15a-21a). Petition for rehearing was denied September 22, 1994

(App., infra, 22a-23a). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATEMENT

Petitioner sued Respondent in the District Court of Dallas County, Texas. Respondent removed the case to the U.S. District Court, Northern Division of Texas (Dallas) based upon diversity of citizenship. Petitioner alleged that Respondent made certain statements to him at the commencement of and during his employment with Respondent regarding commissions and compensations and that Respondent failed to fulfill his commitment. Petitioner asserted claims for fraud, misrepresentation, and breach of contract.

Respondent sought and was granted summary judgment. The court of appeals affirmed.

A. The Breach of Contract Claims was properly pleaded.

After disposing of Petitioner's fraud and misrepresentation claims, the trial court held that he failed to state a claim for breach of contract (App., infra, 6). To the contrary, paragraphs 3.05 and 3.06 of his Original and First Amended Original Petition contained all the necessary elements of a breach of contract cause of action – the existence of a contractual relationship (his employment with Respondent), duties under the contract (payment of $1,000.00 per month plus two percent of all sales within his

territory), a breach of the terms of the agreement (failure to pay the two percent commission) and damages (lost commissions due him at the time of Respondent's breach).

Rule 8 of the Federal Rules of Civil Procedure sets out the minimal requirements of notice pleadings. See:

> "(a) Claims for Relief. . . . (2) a short and plain statement of the claim showing that the pleader is entitled to relief. . . .
>
> . . . .
>
> "(e) Pleading to be Concise and Direct. . . . (1) Each averment of a pleading shall be simple, concise, and direct. No technical forms of pleadings or motions are required. . . .
>
> "(f) Construction of Pleadings. All pleadings shall be so construed as to do substantial justice."

It is not necessary to set out specifically the legal theory upon which a claim is based. Siegelman v. Cunard White Star, Ltd., 221 F.2d 189, 196 (2d Cir. 1955). This Court renounced technical pleadings long ago and stated that ". . . the Federal Rules reject the approach that pleading is a game of skill in which one misstep by counsel may be decisive of the outcome and accept the principle that the purposes of pleading is to facilitate a proper decision on the merits. Conley v. Gibson, 355 U.S. 41, 48, 78 S. Ct. 99,

103, 2 L.Ed.2d 80 (1957). The Fifth Circuit, in other cases, has recognized this interpretation. Palmer v. City of San Antonio, Tex., 810 F.2d 514, 517 (5th Cir. 1987) (mandate to construe complaints liberally "as to do substantial justice"); In Re Plywood Antitrust Litigation, 655 F.2d 627, 641 (5th Cir. 1981) (complaint sufficient if it contains direct or even inferential allegations sustaining recovery under some viable theory).

Respondent could not claim surprise of Petitioner's contract claim. Respondent specifically pleaded a statute of frauds defense in his original answer to the contract claim. Respondent, in Motion for Summary Judgment and Brief in Support Thereof, specifically referred to TEX. BUS. & COM. CODE § 26.01(6) which governs contract (not fraud) actions and stated, "It is also apparent under the circumstances of this case that any contract actions would be barred. . . ." Petitioner also sought attorney's fees under TEX. CIV. P. & REM. CODE § 38.001 which provides for such fees in contract actions. Finally, in the JOINT STATUS REPORT prepared by both parties, reference is made to Petitioner's complaining of the failure to pay the promised commissions and damages.

B. Commissions earned prior to termination of employment are recoverable under a terminable at will employment agreement.

The Circuit Court, in affirming summary judgment, did not discuss whether Petition had failed to plead a breach of

contract claim. Rather, it simply concluded that no damages were available because the employment was terminable at will.

While prospective, "benefit of the bargain," damages may not be recoverable for breach of a terminable at will employment contract, the commissions he earned prior to termination are clearly recoverable. Paniagua v. City of Galveston, Texas, 995 F.2d 1310, 1313 (5th Cir. 1993); Pickell v. Brooks, 846 S.W.2d 421, 425 (Tex. App. - Austin 1992, writ denied). The Circuit Court clearly erred in failing to recognize this distinction.

REASONS FOR GRANTING THE PETITION

The trial court's strict construction of pleading requirements completely frustrates the purpose behind Fed. R. Civ. P. 8. The trial court would apparently require Petitioner to use the magic words "breach of contract" in his pleading. However, as is clearly indicated in Forms 3 through 8 to the Appendix of Forms appearing in the Federal Rules of Civil Procedure, the term "breach of contract" does not appear although each form relates to a cause of action for breach of contract.

The Circuit Court failed to address the above matter, but nevertheless affirmed the summary judgment without recognizing that Petitioner was entitled to commissions earned prior to his termination even though his employment was terminable at will. The substantive law

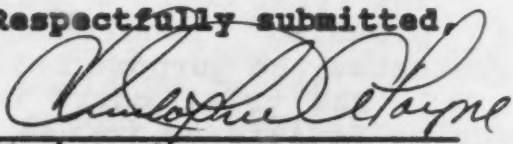
clearly allows him this recovery. To deny Camp an opportunity to recover these damages will provide unscrupulous employers a free hand to defraud workers by promising benefits, additional compensation and incentives with no risk of retribution should they fail, whether intentionally or mistakenly, to provide same. To allow such a system is morally and ethically wrong and offends traditional notions and concepts of justice.

In these respects, both the trial court and circuit court erred.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,



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IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF TEXAS

DALLAS DIVISION

ROBERT CAMP,

Plaintiff,

v. No. 3:91-CV-1884-T

PHILLIP G. RUFFIN,
Individually and/or d/b/a
HARPER HAND TRUCKS, INC.
and/or d/b/a HARPER TRUCKS,
INC. and HARPER TRUCKS, INC.

ORDER GRANTING SUMMARY JUDGMENT

Before the Court is Defendants' Motion for Summary Judgment. The motion is opposed. After consideration, the Court grants the motion.

Background

This lawsuit is based upon allegations by Plaintiff that Defendants promised to pay him certain commissions

and compensation to induce him to accept employment as a sales representative of Harper, and that Defendants later failed to keep these promises. Defendants deny that Camp is entitled to recover commissions or other compensation as alleged and assert that Camp's claims against them are invalid as a matter of law under the facts of this case.

Specifically, Camp alleges that Defendants made three general representations that form the basis of his claims in this case:

(a) a representation that Camp's salary would increase by $200 per month after six months of employment with Ruffin/Harper;

(b) a representation that Camp would receive a 2% commission on all sales from any person or entity located within his district; and,

(c) a representation that his pursuit of certain accounts

would result in an increase of his commissions.

Camp asserts that Defendants failed to fulfill these alleged representations by not increasing his monthly salary and by not paying him commissions on sales of certain products to Wal-Mart Stores, Inc. and to Sam's Wholesale Club, Inc. (collectively referred to as "Sam's"). Defendants respond that the sales in question resulted from Harper's purchase of a company that had been selling these products to Sam's, and not from any sales efforts of Camp. Camp asserts claims for fraud and negligent misrepresentation.

Analysis

Summary judgment is proper when the pleadings and evidence on file show that no genuine issue exists as to any material fact and that the moving party is entitled

to judgment as a matter of law. Fed. R. Civ. P. 56(c). The movant must inform the court of the basis of its motion and identify the portions of the record which reveal there are no genuine material fact issues. *See Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986).

Once the movant makes this showing, the nonmovant must demonstrate that there is evidence in the record establishing that there is a genuine issue of material fact for trial. *Id.* at 323-24. To carry this burden, the opponent must do more than simply show some metaphysical doubt as to the material facts. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586 (1986). The opponent must present evidence sufficient to support a resolution of the factual issue in his

favor. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249 (1986). The court must view all evidence in the light most favorable to the nonmovant. *Id.* at 255 (citing *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 158-59 (1970)). The court may properly enter summary judgment against a party if, after adequate time for discovery, that party fails to establish the existence of an element essential to his case and as to which it will bear the burden of proof at trial. *Celotex*, 477 U.S. at 3224-236.

Camp's claim for fraud is based upon Defendants' alleged promises of future pay raises and commission payments. To support a claim of fraud, Camp must prove that a material representation was made, it was false when made, the speaker knew it was false, or made it recklessly

without knowledge of its truth and as a positive assertion, the speaker made it with the intent that it be acted upon, and the party acted in reliance and suffered injury as a result. *Beijing Metals & Minerals v. Amer. Business Center,* 993 F.2d 1178, 1185 (5th Cir. 1993).

The court is of the opinion that Camp's fraud claim should be dismissed because he failed to present summary judgment evidence of detrimental reliance. *See Crenshaw v. General Dynamics Corp.,* 940 F.2d 125, 128 (5th Cir. 1991) (holding that Plaintiff must meet burden of proving that he acted to his detriment in reliance upon Defendant's alleged representations to prevail on fraud claim). Plaintiff's sole evidence is his sworn statement that he entered into an employment contract with

Harper in reliance on these representations. That evidence is insufficient to establish that Plaintiff was injured by his reliance. Plaintiff argues that injury is established by his loss of the earnings that Defendants told him that he would make. However, because an action for fraud sounds in tort and not in contract, the plaintiff may recover only what he has actually lost, not what he was promised. *Collins v. McCombs,* 511 S.W.2d 745 (Tex. Civ. App.--San Antonio 1974, writ ref'd n.r.e.). Accordingly, Plaintiff must show that he passed up other, more lucrative opportunities in reliance on Defendants' representations. He fails to do this. Therefore, the motion for summary judgment on Plaintiff's claim of fraud is granted.

The court next considers the motion to grant summary judgment on Plaintiff's negligent misrepresentation claim. To prevail on this claim, Plaintiff must show that a representation was made by Defendants in the course of business, that Defendants supplied Plaintiff with false information for guidance in his business, that Defendants did not exercise reasonable care in obtaining or communicating the information, and that Plaintiff suffered pecuniary loss by justifiably relying on the representation. *Federal Land Bank Ass'n v. Sloane,* 825 S.W.2d 439, 442 (Tex. 1991). As with the fraud claim, Plaintiff fails to present evidence of pecuniary loss resulting from the alleged misrepresentations. Therefore, that sum-

mary judgment is granted as to the claim of negligent misrepresentation.

Finally, Defendants assert that Plaintiff has not stated any other claims against them; therefore, Defendants contend that this Court should enter a final judgment against Plaintiff. Plaintiff protests that his complaint states a claim for breach of contract, and therefore his action should not be dismissed.

Rule 8 of the Federal Rules of Civil Procedure sets out the standard for federal pleadings. The rule states that a party need only make a short and plain statement of the claim showing that the pleader is entitled to relief. Fed. R. Civ. P. 8. In compliance with this rule, Plaintiff sets out in his complaint separate counts of fraud and negligent

misrepresentation. He makes no mention of any action for breach of contract.

Plaintiff claims that, in addition to his specific allegations of fraud and negligent misrepresentation, his complaint also contains an inherent cause of action for breach of contract. He argues that a complaint must only give the defendants notice of the claims against them, and that his complaint is adequate to put Defendants on notice of a claim for breach of contract. As proof of the adequacy of his complaint, he points to Defendants' assertion of the statute of frauds in their answer. However, the question before the Court is not what claims Defendants thought Plaintiff might state, but what claims Plaintiff actually did state.

Plaintiff never attempted to amend his complaint to state the claim for breach of contract, nor did he reveal this as a basis for recovery at any time during discovery. This Court feels that it would be unjust to allow Plaintiff to assert a new cause of action now, as an aside in his response to a summary judgment motion, or to allow him to establish the sufficiency of his pleadings by showing what claims Defendants thought he might raise. Therefore, the Court finds that the complaint does not state a claim for breach of contract. Accordingly, the Court will render final judgment in this matter.

It is therefore ORDERED that Defendants' Motion for Summary Judgment and Brief in Support Thereof, filed August 16, 1993, is granted.

Signed this 10th day of November, 1993.

/S/
Robert B. Maloney
Presiding Judge

IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF TEXAS

DALLAS DIVISION

ROBERT CAMP,

Plaintiff,

V. No. 3:91-CV-1884-T

PHILLIP G. RUFFIN,
Individually and/or d/b/a
HARPER HAND TRUCKS, INC.
and/or d/b/a HARPER TRUCKS,
INC. and HARPER TRUCKS, INC.

Defendant.

FINAL JUDGMENT

This action came before the court, Honorable Robert B. Maloney, presiding, and the issues having been duly considered and a decision having been rendered,

It is ORDERED and AJUDGED that Plaintiff's complaint is dismissed with prejudice.

It is FURTHER ORDERED and ADJUDGED that all relief not specifically granted herein is denied.

Signed this 10th day of November 1993.

/S/
Robert B. Maloney
Presiding Judge

Robert CAMP, Plaintiff-Appellant,

v.

Phillip G. RUFFIN, d/b/a Harper Trucks, Inc., d/b/a Harper Hand Trucks, Inc. and Harper Trucks, Inc., Defendants-Appellees.

No. 93-9151
Summary Calendar.

United States Court of Appeals,
Fifth Circuit

Aug. 25, 1994.

Employee brought action alleging fraud, misrepresentation and breach of contract against employer for failure to fulfill certain promises concerning commissions and salary which were allegedly made to employee before he accepted employment. The United States District Court for the Northern District of Texas, Robert B. Maloney, Jr., granted summary judgment in favor of employer. Employee appealed. The Court of Appeals held that: (1) benefit-of-the-bargain losses suffered by employee due to employer's denial of expected commissions and pay raises were insufficient to establish damage element of fraud or misrepresentation claims, and (2) employer was not liable for breach of contract, where there was no written employment agreement.

Affirmed.

1. Fraud 25

Under Texas law, benefit-of-the-bargain losses suffered by employee due to employer's denial of expected commissions and pay raises were insufficient to establish damage element of fraud or misrepresentation claims; employee was required to show that he suffered injury as a result of reliance upon promise or representation in form of out-of-pocket damages or pecuniary loss.

2. Fraud 59(2, 3)

Under Texas law, to show damage element of fraud or misrepresentation claims, plaintiff must show what he has actually lost, i.e., out-of-pocket damages or pecuniary loss, not loss of what he was promised or loss of benefit of contract.

3. Fraud 59(2)

Under Texas law, with certain exceptions, benefit-of-the-bargain damages are not compensable in action for fraud or misrepresentation.

4. Master and Servant 70(1, 2)

Under Texas law, employer was not liable for breach of contract in allegedly failing to honor promises made to employee regarding commissions and salary raises before employee accepted employment, where there was no written employment contract.

Appeal from the United States District Court for the Northern District of Texas.

Before DAVIS, JONES and DUHÉ, Circuit Judges.

PER CURIAM:

Plaintiff appeals summary dismissal of his claims for fraud, misrepresentation and breach of contract. We affirm.

I. Background

Plaintiff Robert Camp sued his employer, Harper Trucks, and its president, Philip Ruffin. The complaint asserted that certain promises concerning commissions and salary made to him before he accepted employment were not fulfilled; it specified two counts of recovery, fraud and negligent misrepresentation.

On Defendants' motion for summary judgment, the district court found that plaintiff's evidence failed to suggest detrimental reliance or actual loss of money and that the common law fraud claim therefore failed. As for misrepresentation, the court found that plaintiff failed to present evidence of pecuniary loss. The district court also found that plaintiff had not stated any other claims such as breach of contract.

II. Fraud and Misrepresentation

[1] Plaintiff argues that to show the damage element of his fraud and

misrepresentation claims, he need not offer evidence that he passed over more lucrative opportunities in accepting employment with Harper; he need only show that, acting in reliance on the promises, he was damaged either by out-of-pocket losses or his loss of the benefit of his bargain. He complains that evidence of lost commissions and the promised pay raise show benefit-of-the-bargain losses, which he contends suffice to raise a fact issue regarding damages so as to defeat summary judgment.

[2] Camp must provide evidence that he suffered injury as the result of his reliance upon a promise or representation in order to support his fraud or misrepresentation claim. *See Beijing Metals & Minerals Import/Export Corp. v. American Business Ctr., Inc.*, 993 F.2d 1178, 1185 (5th Cir. 1993) (common law fraud); *Crenshaw v. General Dynamics Corp.*, 940 F.2d 125, 128 (5th Cir. 1991) (fraud or misrepresentation). The summary judgment evidence of financial injury consisting solely of the denial of expected commissions and a pay raise is insufficient as a matter of law. To support an action for fraud or misrepresentation, a plaintiff must show what he has actually lost--i.e., out-of-pocket damages or pecuniary loss--not loss of what he was promised or loss of the benefit of the contract. *See Collins v. McCombs*, 511 S.W.2d 745, 747 (Tex. Civ. App.--San Antonio 1974, *writ ref'd n.r.e.*) (fraud); *Federal Land Bank Ass'n of Tyler v. Sloane*,

825 S.W.2d 439, 442 (Tex. 1991) (misrepresentation).

[3] Such damages are measured not by what the plaintiff might have gained, had the promise been performed, but by what he has lost. *Collins*, 511 S.W.2d at 747 (citing *George v. Hesse*, 100 Tex. 44, 93 S.W. 107, 107 (Tex. 1990); *Morriss-Buick Co. v. Pondrom*, 131 Tex. 98, 113 S.W.2d 889, 890 (1938). With certain exceptions not applicable here, benefit-of-the-bargain damages are not compensable. *See Frey v. Martin*, 469 S.W.2d 316, 317 (Tex. Civ. App.--Dallas 1971, *writ ref'd n.r.e.*) (explaining 1919 legislation supplementing damages for stock and real estate transactions); *see also Sloane*, 825 S.W.2d at 443 n. 5 (confining prohibition against benefit-of-the-bargain-damages to common-law actions, expressly reserving opinion on damages recoverable in an action based on statute).[1] The lack of

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[1]We think *Sanchez v. Johnson & Johnson Medical, Inc.*, 860 S.W. 2d 503 (Tex. App.--El Paso, writ filed, Sept. 13, 1993), goes against the current of Texas law in this regard. *Sanchez* allowed benefit-of-the bargain damages for fraud occurring in the employment relationship. Noting that *Sloane* and Texas law would appear to deny benefit-of-the bargain damages in misrepresentation actions, *Sanchez* nevertheless allowed such damages because lost wages "would appear to be the only appropriate remedy." 860 S.W.2d at 514.

damages recognizable under Texas law defeats plaintiff's tort claims, because he has not shown that a question of fact regarding injury remains for trial.

III. Contract

[4] We also affirm the court's determination that plaintiff failed to state a claim in contract. The summary judgment evidence established that there was no written employment contract between Camp and Harper. Accordingly, the employment agreement was terminable at will. *See Collins,* 511 S.W.2d at 747 (rejecting plaintiff's claim cast in language sounding in tort as an indirect attempt to recover for the breach of an

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As late as 1991 the Texas Supreme Court "decline[d] to extend damages beyond those limits provided in Restatement section 552B." *Sloane,* 825 S.W.2d at 443. The Restatement restricts damages for negligent misrepresentation to "pecuniary loss"; damages recoverable for negligent misrepresentation "*do not include* the benefit of the plaintiff's contract with the defendant." Restatement (Second) of Torts §552B (1976) (emphasis added). In view of the continued viability of *Sloane, George v. Hesse,* and *Morriss-Buick Co. v. Pondrom,* we do not believe the Texas Supreme Court will depart from the general rule denying benefit-of-the-bargain damages absent one of the recognized exceptions.

unenforceable promise); *Beijing Metals*, 993 F.2d at 128 (oral promise of employment is terminable at will).

For the foregoing reasons, the district court's judgment is

AFFIRMED.

IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 93-9151

ROBERT CAMP,

Plaintiff-Appellant,

versus

PHILLIP G. RUFFIN, d/b/a
Harper Trucks, Inc., d/b/a
Harper Hand Trucks, Inc.
and HARPER TRUCKS, INC.,

Defendants-Appellees.

Appeal from the United States District Court for the Northern District of Texas

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ON PETITION FOR REHEARING

(September 22, 1994)

Before DAVIS, JONES, and DUHÉ, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petition for rehearing filed in the above case is DENIED.

ENTERED FOR THE COURT:

/S/
United States Circuit Judge

(2)
Supreme Court, U.S.
FILED

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SUPREME COURT OF THE UNITED STATES

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Respondents.

On Petition For Writ of Certiorari To The United States Court Of Appeals For The Fifth Circuit

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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PARTIES TO PROCEEDING

The corporate entity named as a respondent in this case, Harper Trucks, Inc., has no parents or nonwholly owned subsidiaries.

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* * * *

Statutes and Rules

Fed. R. Civ. P. 8. 1

IN THE SUPREME COURT OF THE UNITED STATES
October Term, 1994

ROBERT CAMP, *Petitioner*,

v.

PHILLIP G. RUFFIN, individually and/or d/b/a Harper Hand Trucks, Inc., and/or d/b/a Harper Trucks, Inc., and HARPER TRUCKS, INC., *Respondents*.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

SUMMARY OF ARGUMENT

1. Whether the petitioner met the notice pleading requirements of Fed. R. Civ. P. 8 for stating a cause of action for breach of contract is irrelevant because the summary judgment evidence established that there was no written employment contract and, under Texas law, Camp's employment relationship with Harper was terminable at will.

2. In applying Texas law, the Court of Appeals correctly held that only "out-of-pocket" damages are available in Texas for a cause of action based on fraud and negligent misrepresentation.

3. Therefore, no substantial federal question is presented which would necessitate the granting of the Petition for a Writ of Certiorari.

ARGUMENT

I. The Trial Court Was Correct In Finding That There Was No Written Employment Contract Between Camp And Harper And, Therefore, There Was No Breach Of Contract Even If Camp Had Properly Raised It In His Pleadings.

In his First Amended Original Petition, which was properly removed to federal court on September 12, 1991, Camp asserted two separate and specific counts against defendants based upon theories of fraud and negligent misrepresentation. Nowhere in Camp's First Amended Original Petition did he include a cause of action for breach of contract. Camp did not seek damages for breach of contract or plead the necessary elements for breach of contract. Camp's discovery responses did not reveal any additional legal theories upon which Camp based his claims for recovery. Pursuant to the District Court's Status Report Order of September 17, 1991, Camp's counsel made no claim for breach of contract. He only claimed that, as a result of alleged promises to pay commissions made by the employer, he was fraudulently induced to accept employment.

The trial court found that the complaint did not put the defendants on notice of a claim for breach of contract.

This question was only raised at the summary judgment stage when it became apparent that the plaintiff could not satisfy the necessary elements for Texas common law fraud and negligent misrepresentation with the evidence adduced during discovery.

The United States Court of Appeals for the Fifth Circuit did not reach the question of whether Camp had adequately pled a breach of contract cause of action somewhere in his pleadings. The Circuit Court noted that, since undisputed summary judgment evidence showed that Camp came to work for Harper on February 15, 1988, and that there was no written employment contract between Camp and Harper setting forth the specific terms and conditions of his employment or specifying the length of his employment, Camp's employment relationship with Harper was terminable at any time for any reason at the will of either party. Collins v. McCombs, 511 S.W.2d 745-747 (1974); Travel Masters, Inc., v. Star Tours, Inc., 827 S.W.2d 830, 832-33 (Tex. 1991); Winters v. Houston Chronicle Publishing Co., 795 S.W.2d 723, 724 (Tex. 1991); Knowlton v. Greenwood Indep. School Dist., 957 F.2d 1172, 1180-81 (5th Cir. 1992).

Since Camp and Harper had an employment relationship terminable at will, there were no terms of a contract for Harper to allegedly breach. Thus, it was irrelevant whether Camp's pleadings stated a cause of action for breach of contract because there was no contract proven by Camp at the summary judgment stage.

Camp's Petition for a Writ of Certiorari does not seek review of a substantial federal question but, rather, review of the summary judgment evidence as to whether Camp's employment relationship with Harper Trucks was terminable at will under the law of the State of Texas. As the United States Court of Appeals for the Fifth Circuit observed, such a cause of action would amount to a breach of an unenforceable promise and would be barred by the Texas statute of frauds anyway. (See Petition for a Writ of Certiorari, APPENDIX C, Page 6.) For these reasons, Camp's petition should be denied.

II. The Court Of Appeals Was Correct In Applying Applicable State Law In Holding That Only "Out-Of-Pocket Damages" Are Recoverable In Fraud And Negligent Misrepresentation Claims Under Texas Law.

Camp admitted below that his claims for damages are based upon the alleged failure of Harper to fulfill alleged representations that Camp would receive a $200.00 a month increase after six months of employment and 2% commissions on sales of certain hand trucks to Wal-Mart Stores, Inc., and Sam's Wholesale Club, Inc. (collectively referred to as "Sam's") The undisputed summary judgment evidence is that Camp received commissions on sales of Harper Trucks' products in his territory, including sales to Sam's, throughout his entire tenure as an employee of Harper Trucks, Inc., on all accounts that were not deemed to be house accounts. Camp's efforts at making sales to Sam's of certain hand trucks manufactured by Harper

were unsuccessful, so Harper purchased a competing company, Kenmar, Inc., for the sum of $700,000.00 so that Harper could acquire the Sam's business for that particular line of hand trucks. No consideration of the purchase of Kenmar had been made prior to plaintiff's employment with Harper. The decision to purchase Kenmar was made some time in mid-1989, more than one full year after plaintiff began employment with Harper Trucks, Inc. The decision to designate sales generated from the Kenmar acquisition as a house account was made in July, 1989, and Camp was advised by a memo on August 2, 1989, that the sales of Kenmar trucks to Sam's would be considered a house account, and no commissions would be paid to Camp from sales of Kenmar trucks to Sam's. Harper did not pay commissions to sales representatives on house accounts and Camp was aware of this fact.

In this case, Camp does not seek to recover anything that he has parted with as a result of defendants' alleged fraudulent statements. Instead, Camp's "damages" as set forth in the summary judgment evidence consist solely of the expected profit that he hoped to gain from commissions on sales that he did not procure.

The district court held that the evidence before it failed to demonstrate detrimental reliance by Camp, a requisite element essential to his case and as to which Camp shouldered the burden of proof at trial. The district court summarized its analysis of Camp's fraud claim as

follows:

> The Court is of the opinion that Camp's fraud claim should be dismissed because he has failed to present summary judgment evidence of detrimental reliance. *See Crenshaw v. General Dynamics Corp.*, 940 F.2d 125, 128 (5th Cir. 1991) (holding that plaintiff must meet burden of proving that he acted to his detriment in reliance upon defendant's alleged representations to prevail on fraud claim). Plaintiff's sole evidence is his sworn statement that he entered into an employment contract with Harper in reliance on these representations. That evidence is insufficient to establish that plaintiff was injured by his reliance. Plaintiff argues that injury is established by his loss of the earnings that defendants told him that he would make. However, because an action for fraud sounds in tort and not in contract, the plaintiff may recover only what he has actually lost, not what he was promised. *Collins v. McCombs*, 511 S.W.2d 745 (Tex. Civ. App. -- San Antonio 1974, writ ref'd n.r.e). Accordingly, plaintiff must show that he has passed up other, more lucrative opportunities in reliance on defendants' representations. He fails to do this. Therefore,

> the motion for summary judgment on plaintiff's claim of fraud is granted.

Petition for a Writ of Certiorari, APPENDIX A, Pages 6-7.

The Circuit Court reviewed Texas law and agreed with the trial court that Camp was required to provide evidence that he suffered injury as a result of his reliance upon a promise or representation in order to support his fraud or misrepresentation claim. The Circuit Court agreed that Texas law required that a plaintiff must show both "out-of-pocket damages" -- what he actually lost -- not loss of what he was promised or the loss of the benefit of the bargain. The Circuit Court noted that, with certain exceptions, the case law in Texas was clear that Texas law denies "benefit of the bargain" damages in fraud and misrepresentation actions. See Petition for a Writ of Certiorari, APPENDIX C, Pages 4-5, citing Collins v. McCombs, 511 S.W.2d 745, 747 (Tex. Civ. App. -- San Antonio 1974, writ ref'd n.r.e.) (fraud); Federal Land Bank Ass'n. of Tyler v. Sloane, 825 S.W.2d 439, 442 (Tex. 1991) (misrepresentation); George v. Hesse, 100 Tex. 44, 93 S.W. 107 (1906); Morris-Buick Co. v. Pondrom, 131 Tex. 98, 113 S.W.2d 889, 890 (1938).

The summary judgment record is clear that Camp did not act to his detriment upon any alleged representations of defendants. In the appellant's brief to the Circuit Court below, Camp admits that the unpaid commissions which were

allegedly promised constituted "benefit of the bargain" damages. Camp's effort to recover anticipated commissions does not sound in fraud, for the purpose of a fraud claim in Texas law is not to enforce a promise, but to provide compensation for actual "out-of-pocket" loss suffered as a result of a party's detrimental reliance upon another party's fraudulent representation. Collins, 511 S.W.2d at 747.

Before this Court, Camp claims that the Fifth Circuit Court of Appeals wrongfully applied Texas law by failing to consider whether Camp is entitled to "benefit of the bargain" commissions earned prior to his termination. For that principal of law, Camp cites Paniagua v. City of Galveston, Texas, 995 F.2d 1310, 1313 (5th Cir. 1993), and Pickell v. Brooks, 846 S.W.2d 421, 425 (Tex. App. -- Austin 1992, writ denied).

Although Camp's claims in the courts below have included claims for alleged commissions earned prior to and following his termination, Camp did not raise this argument or cite these authorities to the trial court or the Circuit Court. Even on motion for rehearing to the Circuit Court, Camp failed to notify the Circuit Court of its alleged error in this regard.

The cases cited by Camp in his Petition for a Writ of Certiorari do not contradict the great weight of authority cited by the Circuit Court which requires that there be "out-of-pocket" loss in order to support any claim for fraud or misrepresentation under the law of the

State of Texas. There is no distinction in the law of the State of Texas which allows recovery for "benefit of the bargain" damages prior to the termination, but not after the termination, of an employee.

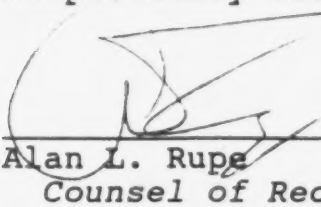
In fact, the Texas case cited by the petitioner, Pickell v. Brooks, supra, does not hold that an employee is entitled to "benefit of the bargain" commissions earned prior to termination. In that case, a parole caseworker employed by the Texas Board of Pardons and Paroles filed a lawsuit claiming due process violations when she was denied supervisory credit for time spent in her job. During the period of her employment, a memorandum was issued by her employer cutting off all credit for administrative experience in lieu of supervisory experience for consideration in job promotions. The employee had claimed vested property rights to the salary and benefits for the time she had already worked. But the Texas court stated that, "Under the at-will employment doctrine, the Board had the authority to modify the terms of her employment as it did in the May 24, 1988, memorandum approved by Heckmann." Pickell, 846 S.W.2d at 425. Thus, Pickell is no support for plaintiff's allegation of error in the application of Texas law to the facts of this case.

CONCLUSION

Since the Circuit Court has correctly determined and applied Texas state law to

the summary judgment evidence in this case, no substantial federal controversy is presented, and Camp's Petition for a Writ of Certiorari should be denied.

Respectfully submitted,



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